

Date: March 4, 1997
Case No.: 95-INA-308

In the Matter of:

S.V. COMPANY,
Employer

On Behalf Of:

SANJAY SONI,
Alien

Appearance: Harvey Shapiro, Esq.
For the Employer/Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(14) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182(a)(14) (1990) ("Act"). The certification of aliens for permanent employment is governed by § 212(a)(5)(A) of the Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of the application for visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under

prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,¹ and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On December 14, 1992, S.V. Company ("Employer") filed an application for labor certification to enable Sanjay Soni ("Alien") to fill the position of Systems Engineer (AF 10). The job duties for the position are:

Undertake systems administration used to estimate job order contracts related to electrical, power, and HVAC requirements; evaluate hardware/software needs at Company's construction sites and implement systems accordingly; implement networks between sites and main office; train users; use Windows 3.1, Harvard Graphics, Novell.

The requirements for the position are a Bachelor's Degree in Computer Science or Electrical Engineering and two years of experience in the job offered. Other Special Requirements are that the candidate must have one year of experience using Windows 3.1, Harvard Graphics, and Novell.

The CO issued a Notice of Findings on August 3, 1994 (AF 67), proposing to deny certification on the grounds that the Employer has failed to adequately document that a permanent, full-time position exists. The CO further found that the position involves a combination of duties and the Employer must document that it normally employs individuals with this combination of duties, or that the combination is a business necessity pursuant to 20 C.F.R. § 656.21(b)(2). The CO additionally found that the hours of work from 7 a.m. to 3 p.m., Tuesday through Saturday, and the Special Requirements, are excessive and restrictive and the Employer must document the business necessity of these requirements pursuant to 20 C.F.R. § 656.21(b)(2)(i). The CO also found that the Alien did not have the required two years of experience prior to his being hired by the Employer in violation of 20 C.F.R. § 656.21(b)(5), and that the Employer unlawfully rejected and failed to recruit in good faith U.S. applicants Nina Ning Lo, James Craig Siano, and Joseph Laemmle in violation of 20 C.F.R. §§ 656.21(j), 656.24(b)(2)(ii), and 656.21(b)(6).

In its rebuttal, dated October 7, 1994 (AF 139), the Employer contended that the position is permanent and full time, the job does not contain a combination of duties, and even if it did, those duties arise from a business necessity. The Employer further contends that the hours required are a forty-hour work week, which is standard in the construction industry, and

¹ All further reference to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

Saturday hours are utilized to enable the employee to catch up so that the computer system is in full working order by each Monday morning. The Employer stated that Special Requirements of knowledge with Windows 3.1, Harvard Graphics, and Novell Netware are business necessities, and are “sophisticated and cannot be mastered in the course of an on-the-job orientation period,” and that the Alien is the first and only employee at the Company performing these duties. The Employer argues that there is no “norm” within the industry as new technology is continually introduced and the profession seeks individuals with knowledge of specific computer hardware, languages, and tools. The Employer further contended that U.S. applicants Lo and Siano were lawfully rejected for failing to have the required experience in Windows 3.1, Harvard Graphics, and Novell Netware, that applicant Siano also failed to meet the educational requirement and was unwilling to work on Saturdays, and that applicant Laemmle was recruited in good faith and failed to contact the Employer after several messages were left on his answering machine and a certified letter was sent to his address.

The CO issued the Final Determination on October 17, 1994 (AF 144), denying certification because the Employer supports its Special Requirements in general terms and failed to submit documentation with specifics as directed pursuant to 20 C.F.R. § 656.21(b)(2). The CO also found that the Employer failed to document that the Alien was qualified for the position at the time of hire, and that it is not feasible to train someone else for the position who had the Alien’s qualifications at the time of hire pursuant to 20 C.F.R. § 656.21(b)(5). The CO further found that U.S. applicants Lo, Siano, and Laemmle were unlawfully rejected for failing to possess the Special Requirements, and not recruited in good faith, as contact by certified mail was not until two months after the Employer’s ads ran.

On November 22, 1994, the Employer requested review of the denial of labor certification (AF 159). The CO denied reconsideration on November 28, 1994, and forwarded the record to this Board of Alien Labor Certification Appeals (“BALCA” or “Board”) on February 13, 1995.

Discussion

Section 656.21(b)(2) proscribes the use of unduly restrictive job requirements in the recruiting process. The reason unduly restrictive requirements are prohibited is that they have a chilling effect on the number of U.S. workers who may apply for or qualify for the job opportunity. The purpose of § 656.21(b)(2) is to make the job opportunity available to qualified U.S. workers. *Venture International Associates, Ltd.*, 87-INA-569 (Jan. 13, 1989) (*en banc*). Where an employer cannot document that a job requirement is normal for the occupation or that it is included in the *Dictionary of Occupational Titles* (“DOT”), or where the requirement is for a language other than English, involves a combination of duties, or is that the worker live on the premises, the regulation at § 656.21(b)(2) requires that the employer establish the business necessity for the requirement.

Section 656.21(b)(6) provides that “the employer shall document that its requirements for the job opportunity, as described, represent the employer’s actual minimum requirements for the job opportunity, and that the employer has not hired workers with less training or experience for jobs similar to that involved in the job opportunity. . . .” An employer is not allowed to treat an alien more favorably than it would a U.S. worker. *ERF, Inc., d/b/a Bayside Motor Inn*, 89-INA-

105 (Feb. 14, 1990). An employer violates § 656.21(b)(6) (now recodified as § 656.21(b)(5)), if it hired an alien with lower qualifications than it is now requiring and has not documented that it is now not feasible to hire a U.S. worker without that training or experience. *Capriccio's Restaurant*, 90-INA-480 (Jan. 7, 1992).

An employer must show that U.S. applicants were rejected solely for lawful, job-related reasons. 20 C.F.R. § 656.21(b)(6). Furthermore, the job opportunity must have been open to any qualified U.S. worker. 20 C.F.R. § 656.20(c)(8). Therefore, an employer must take steps to ensure that it has obtained lawful, job-related reasons for rejecting U.S. applicants, and not stop short of fully investigating an applicant's qualifications. The burden of obtaining proof for obtaining labor certification lies with the employer. 20 C.F.R. § 656.2(b).

Although the regulations do not explicitly state a "good faith" requirement in regard to post-filing recruitment, such a good-faith requirement is explicit. *H.C. LaMarche Enterprises, Inc.*, 87-INA-607 (Oct. 27, 1988). Actions by the employer which indicate a lack of good-faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are thus a basis for denying certification. In such circumstances, the employer has not proven that there are not sufficient U.S. workers who are "able, willing, qualified and available" to perform the work. 20 C.F.R. § 656.1.

At issue in this case is whether the Alien met the requirements for the position prior to being hired, whether the Employer has established the business necessity of its Special Requirements, whether the Employer unlawfully rejected two U.S. workers for not having the Special Requirements, and whether the Employer recruited three U.S. applicants in good faith.

Actual Minimum Requirements:

The Employer requires a Bachelor's Degree in Computer Science or Electrical Engineering and two years of experience in the job offered (AF 10). In the NOF, the CO notified the Employer that the Alien had no experience in this occupation prior to being hired, and his previous experience was with a manufacturer of computer peripherals as a Systems Engineer (AF 64). In rebuttal, the Employer states that it did not train the Alien for the position, and he had the required experience from his employment as a systems engineer at LYNX Computer Products, Inc. (AF 130). The Employer also noted that the Alien's listed experience on Item 15b has been amended to show that he is qualified for the position (AF 131). The CO notes in the Final Determination that the Alien did not amend Form B (AF 142).

Even with the amended language to mirror the requirements of the application, it is difficult to believe that the Alien's employment with a manufacturer of computer peripherals qualifies as experience in a "Construction Consulting Service," that requires estimating "job order contracts related to electrical, power, and HVAC requirements" as stated in the application. See *Newcastle Fabrics Corp.*, 92-INA-305 (May 4, 1994). Moreover, the Employer does not document that the Alien has ever had any experience in the Construction business or dealing with construction cost estimates prior to being hired. We agree with the CO that the Employer has not established that the Alien was qualified for the position prior to being

hired, and thus, a fair test of the labor market has not taken place as to the actual minimum requirements of this position. Certification is properly denied on this issue alone.

Business Necessity of the Special Requirements:

The Employer contends that its Special Requirement of one year of experience in Windows 3.1, Harvard Graphics, and Novell Netware is a business necessity because these software packages are “sophisticated and cannot be mastered in the course of an on-the-job orientation period” (AF 133). We most strongly disagree. These programs are not specific to the construction industry, can be purchased at any retail computer establishment, and most certainly could be mastered by someone with a Masters Degree in Computer Science (as U.S. applicant Nina Ning Lo possesses), a Bachelors Degree in Management Information Systems (as U.S. applicant Siano possesses), or a Bachelors Degree in Electrical Engineering (as U.S. applicant Laemmle possesses). The Employer describes these programs in only general terms because they are general programs, and its above unsubstantiated assertion does not establish business necessity. See *Devera Gilden*, 93-INA-196 (June 9, 1994). We find that the Employer has not adequately documented the business necessity of its Special Requirements, and labor certification is also properly denied in this issue.

As we have found that labor certification has been properly denied on these issues, the remaining issues of the case are rendered moot.

ORDER

The Certifying Officer’s denial of labor certification is hereby **AFFIRMED**.

Entered this the _____ day of March, 1997, for the Panel:

RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such a review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

*Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002*

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with the supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.